Who knows what tomorrow brings? Of uncertainty in times of a pandemic.

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The aim of this contribution is to reflect on an underlying aspect of the pandemic: that is, uncertainty affecting policy makers and regulators. I am, of course, not the first who attempts to draw attention to uncertainty in relation to the pandemic. Horst Eidenmüller in his recent contribution on the desirability of regulatory competition also pointed to the 'huge information deficit' that societies were facing, and Luca Enriques recently wrote on uncertainty in his work on pandemic resistant corporate law.[1]

Uncertainty is a vague concept. It can have different states. Donald Rumsfeld famously captured this point when differentiating between what he called known-unknowns—'we know there are some things we do not know' and unknown-unknowns, which describe a state of complete ignorance: we simply don't know what we don't know.[2] The important point is (following Keynes and Knight)[3] that uncertainty is different from risk. Risk is supposed to be measurable (good enough data allows assigning probabilities to future events); uncertainty is not. Hence, uncertainty will be a problem for anyone that must take a view of the future when making decisions.[4]

John Kay and Mervyn King recently observed that the occurrence of a global pandemic was a known-unknown.[5] It was likely at some point, but they ask 'what was the probability that coronavirus would break out in Wuhan in December 2019?' They point out that there is just no sensible answer to such a question. Importantly, now that the pandemic is in full swing, uncertainty has not suddenly vanished. It is all around. It is in this environment that decision-makers must make decisions that a few months ago seemed remote or even unthinkable. Think of social distancing, decided at the highest political level. Think also of the many recent interventions of financial regulators or central banks in markets.

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[1] Horst Eidenmüller, 'The Race to Fight COVID-19: On the Desirability of Regulatory Competition', Oxford Business Law Blog (31 March 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/race-fight-covid-19-desirability-regulatory-competition> accessed 13 May 2020; Luca Enriques, 'Extreme Times, Extreme Measures: Pandemic-Resistant Corporate Law', Oxford Business Law Blog (22 April 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/extreme-times-extreme-measures-pandemic-resistant-corporate-law> accessed 13 May 2020.

[2] Susan Ratcliffe (ed), *Oxford Essential Quotations* (OUP 2017).

[3] Frank Knight, *Risk, Uncertainty, and Profit* (Hougthon Mifflin Co. 1921); John Maynard Keynes, 'The General Theory of Employment' (1937) 51 Quarterly Journal of Economics 209. On the impact of uncertainty, see also the recent contribution by John Kay and Mervyn King, *Radical Uncertainty* (The Bridge Street Press 2020).

[4] On uncertainty affecting decision-makers in a macro-prudential context, see Pierre Schammo, 'Inaction in Macro-prudential Supervision: Assessing the EU's Response' (2019) 5 Journal of Financial Regulation 1.

[5] John Kay and Mervyn King, 'The Radical Uncertainties of Coronavirus' (Prospect 30 March 2020) <https://www.prospectmagazine.co.uk/magazine/coronavirus-model-uncertainty-kay-king> accessed 13 May 2020.

The fact that decision-makers operate in an environment clouded with uncertainty was driven home by the FCA in its business plan for 2020/21. It noted:

> '[t]he magnitude and duration of the economic shock resulting from coronavirus is highly uncertain. … The new features of the pandemic, and of the environment in which it occurs, lead to an untested and largely unpredictable impact on confidence and investor/consumer behaviours. This shock is not like previous economic downturns, but nor will it follow the pattern of a natural catastrophe, where the damage can be sized relatively quickly. Here, there is enormous uncertainty about the size and nature of potential damage'.[6]

It is against this backdrop of heightened uncertainty that an academic debate on financial regulation should take place. One paradigm that is often given attention in the context of a discussion of uncertainty, especially where coupled with the prospect of irreversible losses, is the precautionary principle. Essentially, the idea is that where an activity threatens to cause irreversible damage, but there is no scientific certainty, precautionary action might be warranted. Covid-19 has started to generate interest in the precautionary principle. Some have turned to it in order to assess the actions or inactions of policymakers. Taleb and Bar-Yam, for example, chastise the UK's initial herd immunity approach which they describe as 'nothing more than a dressed-up version of the "just do nothing" approach' and note that when faced with uncertainty, 'both governance and precaution require us to hedge for the worst'.[7] Meanwhile, Greenhalgh and her co-authors, writing in the British Medical Journal, turn to the precautionary principle in order to argue that policy-makers should recommend the wearing of face masks by the public in the UK.[8] Likewise, calls to improve resilience by building redundancy in response to supply chain frailties,[9] can be understood as an application of the precautionary principle.

That said, the precautionary principle has its critics. Among them is Cass Sunstein.[10] Sunstein has long been a supporter of quantitative cost-benefit analysis and a sceptic of the added-value of a

[6] Financial Conduct Authority, 'Business Plan 2020/21' 9 <https://www.fca.org.uk/publication/business-plans/business-plan-2020-21.pdf> accessed 13 May 2020.

[7] Nassim Nicholas Taleb and Yaneer Bar-Yam, 'The UK's coronavirus policy may sound scientific. It's isn't' *The Guardian* (25 March 2020) <https://www.theguardian.com/commentisfree/2020/mar/25/uk-coronavirus-policy-scientific-dominic-cummings> accessed 13 May 2020.

[8] Trisha Greenhalgh, Manuel Schmid, Thomas Czypionka, Dirk Bassler and Laurence Gruer, 'Face Masks For the Public During the Covid-19 Crisis' BMJ 2020;369:m1435.

[9] Beata Javorcik, 'Coronavirus will change the way the world does business for good' *Financial Times* (2 April 2020) <https://www.ft.com/content/cc2ff3f4-6dc1-11ea-89df-41bea055720b> accessed 13 May 2020.

[10] Eg Cass Sunstein, 'Beyond the Precautionary Principle' (2003) 151 University of Pennsylvania Law 1003.

precautionary principle. For Sunstein, a major problem with the precautionary principle is that it is 'paralysing':[11] it can forbid both action and inaction since both can give rise to risks.

What has this brief discussion yielded so far? First, uncertainty is a major problem for decision-makers, including financial/banking regulators. Second, a precautionary approach *might* have a raison d'être in the face of (unmeasurable) uncertainty and where there is real prospect of irreversible losses. From this, I draw two conclusions. The first is about acknowledging uncertainty and the absence of 'business-as-usual' parameters when putting forward proposals on how to respond to the pandemic and its consequences for the economy and financial markets. At a time where much is unknown, it seems sensible that the debate should be redirected towards a more careful appraisal of the role of uncertainty when considering responses to the current crisis. Consider in this context, the contribution of Chiu, Kokkinis and Miglionico on financial regulation suspensions.[12] They argue that decisions about suspensions should not take place outside a proper framework, but be justified 'within the key tenets of existing institutions'. Hence, they seek, inter alia, to make the most of cost-benefit analysis notwithstanding a lack of dependable numbers. This is perceptive work. But what would have deserved a fuller discussion is the impact of uncertainty on this framework (although to be fair, problematising uncertainty would have required more space than a blog post can offer). The second conclusion is tentative and will require more work. Recall that the need to build resilience in the financial system was a major lesson of the financial crisis. As noted, it can be expected that as the world emerges from the pandemic, one of the lessons will be that it is an imperative in other sectors too. A precautionary principle will support such thinking. However, the elephant in the room is whether the precautionary principle has something to offer to financial/banking regulators. To be sure, in the wake of the great financial crisis, some have argued that financial regulators should apply a precautionary principle.[13] This was essentially a call for regulators to take a pro-active approach to regulation. The current crisis is different. The question that arises is whether under current conditions, a precautionary principle has something to offer when financial/banking regulators consider interventions in markets. Prima facie, there are reasons to be sceptical.[14] One difficulty is (building on Sunstein's work) that it is not clear what a precautionary principle would actually yield, especially if

[11] Ibid 1004.

[12] Iris Chiu, Andreas Kokkinis and Andrea Miglionico, 'Financial Regulation Suspensions in Times of Crisis', Oxford Business Law Blog (10 April 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/financial-regulation-suspensions-times-crisis> accessed 14 May 2020.

[13] Ian Webb, David Baumslag and Rupert Read, 'How should regulators deal with uncertainty? Insights from the precautionary principle' (Bank Underground, 27 January 2017) <https://bankunderground.co.uk/2017/01/27/how-should-regulators-deal-with-uncertainty-insights-from-the-precautionary-principle/> accessed 13 May 2020.

[14] For a more sanguine view on the role of a precautionary principle, see the blog post by Aike Würdemann, 'The corona crisis and the overall imperative of precaution', European Law Blog (6 April 2020) <https://europeanlawblog.eu/2020/04/06/the-corona-crisis-and-the-overall-imperative-of-precaution/> accessed 14 May 2020.

the aim is to avoid irreversible costs. Would it support interventions (including, financial regulation suspensions, financial action, etc.) or would it caution against swift actions? Both action and inaction can prima facie give rise to irreversible costs (e.g. to the economy or financial stability). The jury is out. But should we therefore stop the debate? Clearly not. As the corona crisis unfolds and subsides and as we seek to learn lessons for the future, there is room for a richer debate about uncertainty and in this context whether and, if so, how to give flesh to a precautionary principle.